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IN THE

Supreme Court of the United States

October Term, 1978

No. 79-71

CARLOS BOUTUREIRA, JOSEPH CHIAPETTI and ANDRES SANCHEZ,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

CARLOS BOUTUREIRA, JOSEPH CHIAPETTI AND ANDRES SANCHEZ,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STAE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

The Petitioners, Carlos Boutureira, Joseph Chiapetti and Andres Sanchez, pray that a writ of certiorari issue to review the opinion of the Supreme Court of the State of New York, Appellate Division, First Department.

OPINIONS

The opinion of the Supreme Court, Appellate Division, First Department is reported in 67 A.D.2nd 20, 414 N.Y.S.2nd 159 (see Appendix A).

JURISDICTION

The Order and Judgment of the Supreme Court, Appellate Division, First Department was entered on March 31, 1979. Permission for leave to appeal to the Court of Appeals of the State of New York, was timely sought and leave to appeal was denied by Order dated April 17, 1979 by Honorable Jacob D. Fuchsberg, Associate Judge of the New York State Court of Appeals; an application for reconsideration was timely made, and after reconsideration, leave to appeal was denied by Order dated May 8, 1979 by Honorable Jacob D. Fuchsberg. This Petition was filed less than 90 days from the denial of the leave to appeal. The Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

During the course of the trial, publicity in the form of newspaper articles started to appear and in the course or the examination of the jury, it was discovered that the following headline was read by one Juror in the juryroom to a substantial portion of the Jurors: "VILLAGE RIOT WITNESSES VANISH D.A. TELLS OF THREATS." The Court conducted an in-camera examination of the Jurors on three occasions, at which both the defendant and counsel were excluded. Over counsel's objection, the following questions thereby arise:

1. Whether the action of the trial judge in excluding the defendants and counsel from the in-camera questioning of the jurors regarding publicity was a violation of due process under the Fourteenth Amendment and a violation of the defendants' right to be present throughout the trial with the assistance of counsel under the Sixth Amendment.

2. Whether the action of the juror, in reading aloud the

headline to the other jurors in connection with the action by the prosecutor, deprived the petitioners of a fair trial as required by the due process clause of the Fourteenth Amendment and the impartial jury provision of the Sixth Amendment.

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Constitution of the United States, Amendment XIV.

§1 . . . . "nor shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF FACTS

The Petitioners, along with six others, were indicted for the crimes of Manslaughter in the First Degree, Conspiracy, Riot and Assault; arising out of an incident in Washington Square Park on September 8, 1976. After trial three of the defendants were acquitted. The Petitioners Joseph Chiapetti and Andres Sanchez were convicted of Manslaughter in the First Degree and other lesser crimes. The Petitioner Carlos Boutureira was convicted of Assault in the First Degree and other lesser crimes. The defendants Michael Andriani and Michael Doyle were returned to a trial court for a new hearing in accordance with the opinion

of the Appellate Division, First Department. The defendant Robert McLamb has not joined in the Petition.

Almost from the outset of this trial, the prosecutor began intimating to the jury that the People's witnesses were afraid to testify and feared the defendants and their friends. Prior to the appearance of any publicity, the prosecutor took the opportunity to strongly object to the divulging of the witnesses' addresses, even though in some instances the question did not ask for the address (671, 704, 862).* The tactic was continued throughout the trial with many other witnesses (1466, 1543, 1544, 1547, 1596, 1808, 1846, 2734) even after the newspaper articles began appearing.

On Friday morning, February 10, 1978, after the brief testimony of a witness, the prosecutor stated in the presence of the jury as follows:

> MR. MOSCOW: Your Honor, at this time the People would ask for a brief recess. There is a dearth of witnesses *who have been subpoenued.*
>
> MR. FERRIGNO: Object.
>
> MR. MOSCOW: I cannot proceed in the absence of those witnesses.
>
> THE COURT: You may no witnesses [sic] to call now?
>
> MR. MOSCOW: What?
>
> THE COURT: Do you have a witness to call?
>
> MR. MOSCOW: I am informed that the witnesses I was intending to call are not here, Your Honor (1228)" (Emphasis added).

*Refers to Trial Transcript.

The prosecutor, in open court, but out of the presence of the jury, then asked that the defendants be remanded, stating that certain witnesses had not appeared and that a witness had been told in substance that it would be healthier not to testify;that the People could not proceed without the testimony of these witnesses, and that the Court remand those defendants on whose behalf the alleged threats were made without evidence that the defendants made them (1230-1232).

The Court then explained to the jury that they were being excused because "The People do not have another witness or witnesses ready to testify" (1240). After making a long application in open court with the press present concerning the disappearance of witnesses, the prosecutor then withdrew his application to remand the defendants (1248). Predictably, over the weekend, there were newspaper articles reporting the disappearance of witnesses.

The next day that the court was in session was Wednesday, February 15, 1978—the Court having recessed for other business on Monday and Tuesday. At the beginning of the morning session, counsel informed the court of the existence of two newspaper articles. One had appeared in the New York Times on Saturday, February 11, 1978, and its headline read: "A WITNESS DISAPPEARS IN VILLAGE KILLING CASE." The article stated that a witness scheduled to testify against the defendants "disappeared yesterday and at least three of the prosecution witnesses were held in custody to assure their appearance." The article mentioned that "still another prosecution witness, scheduled to testify yesterday, could not be located . . . ."

Counsel brought to the Court's attention an article that appeared in another edition of the February 11th New York Times. This article contained a quotation from an interview with one of the prosecutors trying the case and dealt with "disappearance" of "witnesses." An article in the Daily News, dated February 15, 1978, was brought to the court's attention;

the headline read "PARK SLAYING WITNESSES VANISH." The article stated: "Two witnesses slated to testify against . . . had disappeared" and attributed to the prosecutor a statement that "Other witnesses had been advised by people in the community that it would be healthier, if they did not testify." Based on the newspaper articles and the prosecutor's statements on the previous Friday that there was a dearth of witnesses, counsel requested that each of the jurors be examined in camera with counsel present with the Court supervising the examination (1227). The court denied counsel's request, but stated it would ask a general question of the jury to see if any of the jurors saw the headline over the long weekend (1282).

The court asked the jury in open court if they had seen any newspaper articles. At least three of the jurors answered affirmatively (1291-1292).

After luncheon recess, the Court stated that there was a headline concerning the case in today's New York Post and it intended to examine the jurors individually to ascertain whether any of them had seen this headline (1405). The Court later that day, in the absence of counsel and the defendants, proceeded to question the jurors in camera. The Court apparently was already aware that a copy of the Post with the following headline "VILLAGE RIOT WITNESSES VANISH D.A. TELLS OF THREATS" had been brought into the juryroom.

The next day the minutes of the *in-camera* questioning were made available to counsel. It was pointed out to the court that counsel had previously made a request that the court examine the jurors individually and that counsel be present. The court replied that it didn't believe that counsel had requested to be present, but if counsel had requested, it would have denied the application (1606).

After reviewing the minutes of the *in camera* examination, it was pointed out to the court that one of the jurors stated that the headline was read to the entire jury (1607). The court replied that the transcript was incorrect. It was pointed out that if

counsel were present they could have guarded against this situation. The court then stated that it would examine juror No. 1 alone (1610) and would examine the remaining jurors if appropriate (1619). Counsel again requested to be present during the examination (1620). A motion for a mistrial based on the reading of the headline was denied (1619-1620).

On February 17, 1978, the Court questioned juror No. 1 in camera. The juror stated that one of the other jurors had read the headline of the February 15th Post's article aloud in the juryroom (1753), and that the juror was "*yelling* . . . talking" after he read the headline (1756). The court again, without counsel's knowledge or presence, questioned the offending juror. Juror No. 10 now acknowledged reading the Post's headline aloud in the juryroom while some of the other jurors were present (1761-1763). When asked what he remembered, the juror replied "Witness disappears, something like that D.A. tells of threats." The court, despite the prior statement, that if it found out the headline was read it would question all the jurors, did nothing.

On February 22, 1978, counsel requested that the entire panel be questioned with all counsel present. The court replied that it did question two jurors and if counsel requested it would continue that questioning, but would not permit counsel or the District Attorney to be present. Counsel again objected to the fact that counsel could not be present at the examination (2353). A motion for mistrial was denied (2351).

On February 23, 1978, eight days after the jurors stated that the headline had been read to the entire panel, the court again questioned the entire panel concerning the headline in the absence of counsel and the defendants, and based on that last examination of the jurors, counsel again, on March 3, 1978, moved for a mistrial (3509).

The improper conduct of the prosecutor and the aggravation by him of the prejudice created by the newspaper articles, asserting that witnesses had been threatened, continued immedi-

ately. After repeatedly showing the next witness Sewell his grand jury testimony and asking him if it refreshed his recollection—again implying clearly that the witness had said something damaging when he testified before the grand jury, the prosecutor asked the witness Sewell if he was reluctant to testify. The court permitted the question and the answer "Yeah" (1647). A motion for a mistrial was denied (1648).

On February 21, 1978, at the close of the prosecutor's examination of the witness Rizzo, the following occurred:

"Q. Now, Mr. Rizzo, are you here voluntarily, Sir?"

A. No, I am not.

Q. How did you get to Court today?

A. Well, I was brought here by two detectives.

Q. From where.

A. They had me in custody overnight in a hotel, and I was staying with two detectives (1963)."

On the next day, February 22, 1978, on redirect examination of the witness Maguire, the prosecutor, again attempting to suggest to the jury that witnesses were being intimidated, asked Maguire if he had spoken to anyone "now in Court" between the time he spoke to the prosecutor in the morning in his office and the time he testified in court. The witness indicated a man seated in the rear of the courtroom (2297-2298). The prosecutor then made the following gratuitous statement in the presence of the Jury:

MR. MOSCOW: Indicating a gentleman in the rear row in a light blue shirt with glasses above his head, height is unknown to me, his weight appears to be quite large.

No further questions of this witness, your Honor.

THE COURT: Are we going to identify for the record the person that you are indicating?

* * * * *

THE COURT: Well, I'll ask that person to state his name.

* * * * *

THE COURT: Sir?

THE MAN SEATED IN THE BACK ROW: Anthony Costanza.

THE COURT: What time did you speak to that gentleman?

THE WITNESS: I don't know; I don't know.

THE COURT: In relation to when you testified?

THE WITNESS: About twenty minutes before.

THE COURT: Twenty minutes before you testified?

THE WITNESS: Yeah, during the recess, the ten minute recess that you had in the morning. That's when it was. Whenever time that was" (2298-2299).

Still in the presence of the jury, the prosecutor then moved for the exclusion of the person identified (2302). In granting the motion, the court stated "*I decide that it's safer to have the person excluded during the testimony*" (emphasis added). The court then changed it's mind about the order (2314-2318), but the damage had been done.

Finally, when the prosecutor rested, he stated that "the People have no further witnesses available at this time" (3078) — once more suggesting that witnesses were missing.

REASONS FOR GRANTING THE WRIT

1. **The decision below directly conflicts with the Petitioners' rights to be present and have the effective assistance of counsel guaranteed by the Sixth Amendment.**

The trial court, after learning of the action by one juror in reading a headline highly prejudicial to the defendants to other members of the jury, refused counsel's repeated requests to be present at the examinations of the jurors. The refusal deprived the petitioners of their right to be present throughout the trial and the right of the effective assistance of counsel.

Rogers v. United States, 422 U.S. 35 (1975) reaffirmed the principle that the defendant has the right to be present from the time the jury is impaneled until it is discharged after rendering the verdict.

The Court stated at Page 38:

> "In *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76 (1919), the Court observed 'That the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be *present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.' Id.* at 81. In applying that principle, the Court held that the trial judge in a civil case had erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction." *Ibid.* (Emphasis added).

In the present case, neither the defendant nor counsel were permitted to be present at the time of the questioning of the jurors regarding the reading of this headline.

This Court, in discussing the rights of an accused during a trial, stated in *Faretta v. California,* 422 U.S. 806 (1975) at page 816:

> "For example, in *Snyder v. Massachusetts,* 291 U.S. 97, the Court held that the Confrontation Clause of the Sixth Amendment gives *the accused a right to be present* at all stages of the proceedings where fundamental fairness might be thwarted by his absence. This right to 'presence' was based upon the premise that the '*defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself*'." *Id.,* at 106 (emphasis added).

Fundamental fairness was thwarted by the absence of petitioners and counsel. For what was at issue was the petitioners' right to a fair and impartial jury under the Sixth and Fourteenth Amendments. The exclusion of the defendants and counsel, after the court had become aware that the headline had been read out loud in the juryroom, was a critical stage of the proceeding.

The questioning of the individual jurors, in the absence of counsel and the defendants, is an extraordinary departure from the adversary nature of criminal proceedings.

In *United States v. Jones,* 542 F.2d 186, 214 [Fourth Cir. 1976] the Court stated:

> "* * * we are of the opinion that, absent consent of all counsel, in-camera examinations of jurors should not be conducted by a trial judge without the presence of counsel."

See also American Bar Association, *Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press,* §3.5(f) 1968.

The questioning of sworn jurors as to their continued ability to be fair and impartial after exposure to prejudicial material has the same purpose as the voir dire, that is, to insure a fair trial. Therefore, counsel's presence is as critical there as during the jury selection process. In the case at bar, the need for

counsel was even greater, for it is uncontested that information prejudicial to the defenants was communicated to the jury. In order for counsel to have provided effective assistance, it was necessary for counsel to witness the questioning of the jury. As this Court noted in *Glasser v. United States,* 315 U.S. 60, 76 (1942):

> "The right to have *the assistance of counsel is too fundamental and absolute* to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial" (emphasis added).

The need for counsel to be present is amply illustrated by the record; for after the trial court's first in-camera inquiry of the jury, it failed to note the response of one of the jurors that the headline had been read in the juryroom. Indeed, when the transcript of the examination was available and the response of the juror was pointed out to the court, the court took the position that the transcript was incorrect.[1] Even after the court confirmed in its own mind by the examination of two of the jurors that the headline had been read, the court still took no action until requested to do so by counsel. The final interrogation did not occur until eight days after the incident took place. Had counsel been present, the response of the juror certainly would not have been overlooked. The result could have been one ex-

1. THE COURT: That is incorrect, Mr. Direnzo. The word "read" is not correct. Miss Wilson never told me that she read or had read to her the articles. Now I have not read these minutes. They came in early this morning, and I told you I hadn't read them. That word, "read" is incorrect. I do not recall the correct statement or the true statement that Miss Wilson did make, but it is my recollection that the substance of the statements that someone told her about the fact that there was an article in the case. She said that she remembered some part of the headline. It may have been she said someone told her of the headline. I don't recall that, but really she didn't say that anyone read from the articles (1608-1609).

amination on one day, instead of three examinations over a period of eight days.

As soon as the court learns that inadmissible news accounts have been brought to the attention of the jury, the court must promptly take steps to ascertain that any verdict would not be affected thereby, but would rest solely upon evidence produced in open court, *U.S. v. Perotta,* 553 F.2nd 247 [First Cir. 1977]; *Margoles v. U.S.,* 407 F.2nd 727 [Seventh Cir. 1969]. The action by the court in the instant case was not prompt and in each instance occurred only because of prodding by counsel.

The continuing dilemma of prejudicial information reaching the jury through the media during the course of a trial underscores the importance of the Constitutional problem and the need for elaboration of guiding principles by this Court.

2. The Petitioners were denied due process and their right to a trial by an impartial jury within the meaning of the Fourteenth and Sixth Amendments by the action of the prosecutor in creating an atmosphere of fear at the trial.

A jury's verdict must be based upon evidence in court and not influenced by outside sources, *Sheppard v. Maxwell,* 388 U.S. 33 (1966); *Marshall v. U.S.,* 360 U.S. 310 (1959) and, as was stated by this Court in *Turner v. Louisiana,* 379 U.S. 466, 472-473 (1965):

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury."

The principles were more recently summarized in the case

of *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) wherein this Court stated:

> "The Sixth Amendment in terms guarantees 'trial, by an impartial jury . . . ' in federal criminal prosecutions. Because 'trial by jury in criminal cases is fundamental to the American scheme of justice' the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).
>
> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent jurors . . . ' A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn' Co. Litt. 155b. His verdict developed the trial. Irvin v. Down, 366 U.S. 717, 722."

In the case at bar, the news accounts did reach the jury and were provoked and generated by the action of the prosecutor, both in and out of court.[2] The prejudicial news reports were

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2. MR. MOSCOW: I have spoken with no one from the press since the Court issued its direction yesterday.
MR. DIRENZO: Since yesterday? But in other words, it happened before?
TH ECOURT: Well I know that, Mr. Direnzo, that was the reason that I gave the direction to Mr. Moscow. (1617).

highlighted and brought into focus by the action of the prosecutor in creating an atmosphere of fear in suggesting to the jury that witnesses that did appear were not telling the truth because of intimidation and witnesses had not appeared for the same reason. Indeed, in the second in-camera examination of juror No. 10, the interplay of the newspaper reports and the prosecutor's action becomes readily apparent.

> "THE COURT: I see
>
> Assuming that the district attorney did say that there were threats to his witnesses — now we don't even know if that's true — right?
>
> MR. UMBAUGH: Right?
>
> THE COURT: But if the district attorney did say that there are threats to his witnesses, you don't know who the threats are from or to whom they are directed but still there's something in your mind about threats, and I want to—
>
> MR. UMNBAUGH: Well, there's something in my mind about threats, but the thing that's in my mind about threats is the demeanor of some of the witnesses on the stand at least two, that I'm reasonably sure are well, the guy said he was reluctant yesterday. Another guy who seemed to be reluctant, you know."

In *Marshall v. U.S., supra,* this Court reversed the conviction where prejudicial newspapers articles were read by the jury, despite the finding that the jurors gave their assurances that they would not be influenced by the newspaper stories. Juror No. 12, when first asked, replied, "I believe I can" (1497-1499). Juror No. 8, when asked how she felt about the phrase "witnesses vanish" replied, "It doesn't suggest much to me, I mean it does suggest a question or two . . . " Juror No. 5 replied, "I don't think so, I don't think that it would influence me at all, some I

believe some I don't. I don't necessarily believe them, it isn't necessarily so. I follow my own opinion." (2413).

That the headline remained in the minds of some of the jurors and that they had discussed it, even after the judge questioned them, is illustrated by the answer at the second full examination on February 23, 1978 by juror No. 11 when he replied to a question, whether he had heard anything about the headline, that "yes, somebody said a witness vanished that was all, but was after I spoke to you, not before." (2127).

In *Turner v. Louisiana, supra,* page 472, this Court stated:

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law' *Sinclair v. United States,* 279 U.S. 749, 765. Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere' *Frank v. Mangum,* 237 U.S. 309 (dissenting opinion)."

Indeed, it has been held that jurors' assurances are sometimes not enough to counter prejudicial publicity from a news report. See *U.S. v. Williams,* 568 F.2nd 464 at 471 (Fifth Cir. 1978); nor is the fact that only the headline was read in the juryroom determinative of the issue. In *Mares v. U.S.,* 373 F.2nd 805 at page 809 (Tenth Cir. 1967), the court stated, in reversing a conviction, "If any juror even saw the headline and connected it with the trial in progress, the possibility that it would not prejudice the juror is so slight, that it merits no consideration." In this case, virtually every juror saw or read the headline and connected it with the case and this connection was reinforced and aggravated by the not so subtle suggestions by the prosecutor of intimidation of witnesses and the fact that witnesses were missing.

The petitioners were deprived of their right to a fair trial not only by the newspaper publicity which was in part generated by the prosecutor, but by the prosecutor's conduct in court in front of the jury which reinforced and emphasized what the newspaper headline said.

CONCLUSIONS

For these reasons, a writ of certiorari should be issued to review the judgment and the opinion of the Supreme Court of the State of New York, Appellate Division, First Department.

Respectfully submitted,

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APPENDIX A

Opinion of Appellate Division, First Department, October 1978

Samuel J. Silverman, J.P.; Arnold L. Fein, Arthur Markewich, Leonard H. Sandler, JJ.

The People of the State of New York,
Respondent,

against

Michael Andriani, Carlos Boutureira, Joseph Chiapetti, Michael Doyle, Robert McLamb and Andres Sanchez,
Defendants-Appellants.

3869; 3870; 3871; 3782; 3873; 3874

Appeals by defendants-appellants Michael Andriani, Carlos Boutureira, Joseph Chiapetti, Michael Doyle and Robert McLamb from judgments of the Supreme Court, New York County (Haft, J.) rendered May 12, 1978 and by defendant-appellant Andres Sanchez from a judgment of the Supreme Court, New York County (Haft, J.), rendered June 28, 1978. Defendants Andriani and Boutureira were convicted of Conspiracy in the Third Degree (Penal Law §105.15), Assault in the First Degree (Penal Law §120.10), two counts of Assault in the Second Degree (Penal Law §120.05) and Riot in the First Degree (Penal Law §240.06). Defendants Chiapetti, McLamb and Sanchez were convicted of Manslaughter in the First Degree (Penal Law §125.20), Conspiracy in the Second Degree (Penal Law §105.10), two counts of Assault in the First Degree, two counts of Assault in the Second Degree and Riot in the First Degree. Defendant Doyle was convicted of two counts of Assault in the First Degree, two counts of Assault in the Second Degree and Riot in the First Degree.

* * * * * *

3869-74 — *People v. Chiapetti, etc.*

MARKEWICH, J.

On the evening of September 8, 1976, Washington Square Park in New York County was invaded by a group of men armed with clubs, sticks, bats and other weapons, apparently bent on driving out a number of denizens of that area. During the brief course of events several persons were attacked, resulting in a homicide and injuries to victims of assault. The six defendants-appellants involved in these appeals were convicted of various crimes after trial to a jury and received various sentences. We consider the sentences appropriate.

Although there were a number of witnesses who were victims of the assaults and other crimes, and others as well to provide corroborative testimony, a good part of the evidence was supplied by accomplices or witnesses who colorably might be claimed to be such. The jury was properly instructed on the law applicable to this type of situation; the evidence was sufficient, depending on acceptance or rejection by the triers of the fact, to provide a basis either way as to accomplice status, as well as for corroboration where necessary. See *People v. Basch,* 36 N.Y.2d 154, 157. There was sufficient evidence and an appropriate charge on the applicable law to sustain every count as to which the jury convicted.

It was unfortunate that a newspaper article with a headline suggesting intimidation of witnesses by defendants somehow found its way into the jury room. The court inquired into this circumstance in camera without the presence of either defendants or counsel, but using questions provided by counsel. Presence of the defendants was not required; "the trial justice's questioning of the jurors in chambers under the circumstances present here did not constitute a material part of the trial." (*People v. Mullen,* 44 N.Y.2d 1, 5). The presence of counsel for six defendants in this scene would have been disruptive and

harassing. The record made of the proceedings demonstrates even-handed fairness in the inquiry. There was as well complete absence of that adversary-type of atmosphere which is inevitably the accompaniment of probing cross-examination carried on by an advocate. Actually, the only real objection to this wise exercise of discretion by the trial court is based on technical grounds. This proceeding did not have as its object the determination of guilt or innocence but was designed to assist the court in an exercise of discretion. We see no significant probability of prejudice in the method employed.

We do, however, find otherwise as to a ruling made by the court during trial (CPL 710.40[2]) on an application to reopen a so-called Wade hearing involving identifications made by the witness Febee (CPL 710.20[5]). Febee had been assaulted, he testified, by defendant Doyle; he also identified defendant Andriani as having been the active participant in the assault made on one Warren, though others were involvfed in the latter crime as accomplices. Obviously Febee was a key witness, but his identity was never made known to defendants or their counsel prior to the trial, and certinly not at the lineup, staged under most peculiar circumstances, characterized by the trial court as "not a mode to be followed." A curtain was hung in such a way as to preclude any observed from seeing who was engaged in the process of attempting to identify those in the array. Febee had been shown a set of photographs of known or suspected participants in the fracas by police in circumstances not entirely known. There were other factors in respect of Febee indicating that examination of this sole witness as to one defendant, and important witness as to another, would have been appropriate. His military service, spent in police work, had been as an expert in identifying deserters from photographs he had studied; this could have cut either way, making him an expert in identification or, contrariwise, one accustomed to having an image burned on his mind by a photograph. Further, Febee had, immediately before the events in the Park, consumed a quantity of alcohol and had also smoked marijuana, though he testified

that his mind had been cleared by exercise with a frisbee. In addition, Febee had no more than a split-second interval in which to observe the person who committed the assault upon him.

When Febee—referred to up to that point as "Mr. X"—was produced as a witness, counsel, not having had a prior opportunity, moved to have the Wade hearing reopened for examination as to possible suggestion practiced upon the witness. The application was summarily denied. In the special circumstances of this case, we hold this to have been error equiring reopening of the hearing. The factors involving Febee's ability to observe, whether as affected by shortness of time or possible impairment of his senses by substances taken internally, or prior training, raise issues cognizable only by the triers of the fact. Taken by themselves, they do not provide a foundation for a Wade hearing. However, added to the secrecy surrounding the lineup, and the exhibition to Febee of the photographs of suspects, they do furnish such a basis. In short, in the circumstances found in this case, it would have been appropriate to order a Wade hearing upon timely motion therefor, or as here, where his identity was kept secret prior thereto, at the trial itself. It is not a novel proposition that the lineup is a critical stage in testing identification and that what happens there is to be preserved for use by defense counsel at a pre-trial suppression hearing (*U.S. v. Tolliver,* 569 F.2d 724, 728); that any pretrial confrontation of a defendant should be examined to determine whether there has been interference with his right meaningfully to conduct cross-examination (*U.S. v. Wade,* 388 U.S. 218, 227); that the element which is the focus of the examination is the reliability of the identification and its consequent admissibility (*Manson v. Brathwaite,* 432 U.S. 98, 114); that, when a suppression hearing pursuant to Article 710 CPL is conducted under circumstances which do not afford a defendant a proper opportunity to test the validity of an identification, a new or re-opened hearing becomes necessary (*People v. Buie,* Appeal No. 3815, December 14, 1978, Appellate Division, First

Department). This court, confronted by a somewhat similar situation, fashioned a similar remedy some years ago. in *People v. Martin,* 35 A.D.2d 786, a witness aw the defendant in what was characterized as a "showup," i.e. presentation of a suspect to a prospective witness, alone, without others with him to provide possibility of an alternative choice, thereby strongly suggesting that the person shown should be identified. The witness did not appear at the hearing. "At the hearing, defense counsel asked that he be produced by the District Attorney. He was not produced, and the hearing court gave no direction that he be produced. His version of the circumstances at the times he saw the defendant should have been most relevant in arriving at a finding concerning elements of possible suggestion, and he should have been called even if it had been necessary for the court to call him. That . . . [the witness] . . . testified thereafter at the trial and was cross-examined and that the jury apparently accepted his identification is of no moment; what concerns us is that his evidence was not available as part of the process leading to the findings and conclusions of the hearing court. Accordingly, we direct that the hearing be reopened to that end." (*People v. Martin,* supra).

Cross-examination of Febee at the trial was not a substitute for the *pre-trial* Wade hearing as envisioned by the case which gave that procedure its name, regarded as so important in our law when improperly carried out that it presents one of the rare instances in which the right to appeal survives a plea of guilty (CPL 710.70[2]).*

Doyle, as has been said, was identified as Febee's assailant by the victim himself; his other convictions were vicariously earned as an accomplice. Andriani, aside from having been identified by Febee as Warren's assailant, was also identified by Warren. Further he was convicted of several other counts.

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*We are certainly not unaware that the hearing ordered in *People v. Martin, supra,* was never held because the witness had disappeared and that the case was decided solely on examination of the trial testimony (38 A.D.2d 536; aff'd 32 N.Y.2d 771). But we need not cross that bridge at this juncture.

However, we have no way of knowing the extent to which Febee's identification of either played a part in the general process of the jury's evaluation in respect of the other counts. Therefore, both appeals must be held in abeyance in toto, and remanded.

Were we persuaded that the prosecutor had acted in bad faith in his pursuit of the ploy of concealment of Febee's identity, we might not afford this opportunity to present the missing witness. See *People v. Havelka,* 45 N.Y.2d 636, 642-3. The difficulty is that the court's erroneous ruling on the request to reopen the Wade hearing precluded the immediately available cure of holding the hearing then and there. A test of the prosecutor's good faith will be whether he produces Febee at the hearing we now order.

Accordingly, the judgments of conviction, Supreme Court, New York County (Haft, J.), rendered May 12, 1978 of defendant-appellant Boutureira of conspiracy, third degree, of assault, first degree, of assault, second degree (two counts), and of riot, first degree, and of defendants-appellants Chiapetti and McLamb of manslaughter, first degree, of conspiracy, second degree, of assault, first degree (two counts), of assault, second degree (two counts), and of riot, first degree, should be affirmed, and defendants-appellants Chiapetti and McLamb directed to surrender; and the judgment of conviction, same court and justice, rendered June 28, 1978 of defendant-appellant Sanchez of manslaughter, first degree, of soncpiracy, second degree, of assault first degree, of conspiracy, second degree, of assault, first degree (two counts), of assault, second degree (two counts), and of riot, first degree, should be affirmed, and defendant-appellant Sanchez directed to surrender, and the appeals from judgments of conviction, same court and justice, rendered May 12, 1978 of defendants-appellants Andriani and Doyle should be held in abeyance and the matter remitted as a matter of discretion in the interest of justice to Supreme Court,

New York County, for the reopening and continuance of the pre-trial hearing on the subject of identification of defendants--appellants Andriani and Doyle by the witness Febee, to make new findings of fact and conclusions of law, and a new determination.

All concur except Sandler, J., who dissents as to Doyle in an Opinion.

3869-74—*People v. Chiapetti, etc.*

SANDLER, J. (dissenting as to defendant Doyle)

I am in agreement with the opinion of the court except with regard to the conclusion that the evidence was legally sufficient to sustain Doyle's conviction on varied counts.

The case against Doyle rests entirely upon his identification by a single witness Febee. As the court's opinion suggests, such testimony is normally sufficient to raise a factual question to be determined by the jury. However, the principle has been also long established that evidence may be sufficient to make out a prima facie case and yet fail to be legally sufficient to establish guilt beyond a reasonable doubt. See *People v. Ledwon,* 153 N Y 10, 17-18; *People v. Seppi,* 221 N Y 62, 68. This seems to me such a case.

As the court's opinion notes Febee had only a "split second" opportunity to observe the person whom he identified as Doyle. The circumstances of this observation could hardly have been less conducive to accuracy. The witness was running down a ramp in flight from threatening conduct by others when the group of which Doyle was allegedly one ran towards him and by him.

I do not question the jury's implicit determination that Febee was a reliable witness, notwithstanding his acknowledgment that he had been intermittently "high" on marijuana during the hours preceding the critical events. Indeed, an examina-

tion of the record persuades me that this jury in general approached its difficult task in an exemplary manner.

Nonetheless, accepting Febee as a reliable witness, and assuming that his powers of observation were greater than those of the average person, as I am inclined to believe, there is inherent in the circumstances of the observation an unusual potential for error that cannot be disregarded. The possibility of error here is simply too substantial to support the conclusion that Doyle's guilt was proved beyond a reasonable doubt.

APPENDIX B

Order of Appellate Division Affirming Judgment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on 13th day of March, 1979

Present—Hon. Samuel J. Silverman, Justice Presiding; Arnold L. Fein, Arthur Markewich, Leonard H. Sandler, Justices.

3869

The People of the State of New York,
Respondent,

-against-

Joseph Chiapetti,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Haft, J.), rendered on May 12, 1978, convicting defendant, after a jury trial, of manslaughter in the first degree, conspiracy in the second degree, assault in the first degree, assault in the second degree, and riot in the first degree, and said appeal having been argued by Mr. Conrad F. Ferrigno of counsel for the appellant, and by Mr. Robert M. Pitler of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

JOSEPH J. LUCCHI,
Clerk.

APPENDIX C

Order of Appellate Division Affirming Judgment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on 13th day of March, 1979

Present—Hon. Samuel J. Silverman, Justice Presiding; Arnold L. Fein, Arthur Markewich, Leonard H. Sandler, Justices.

3872

The People of the State of New York,
Respondent,

-against-

Andres Sanchez,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Haft, J.), rendered on June 28, 1978, convicting defendant, after a jury trial, of manslaughter in the first degree, conspiracy in the second degree, assault in the first degree, assault in the second degree, and riot in the first degree, and said appeal having been argued by Mr. Robert Louis Cohen of

counsel for the appellant, and by Mr. Robert M. Pitler of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

JOSEPH J. LUCCHI,
Clerk.

APPENDIX D

Order of Appellate Division Affirming Judgment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on 13th day of March, 1979

Present—Hon. Samuel J. Silverman, Justice Presiding; Arnold L. Fein, Arthur Markewich, Leonard H. Sandler, Justices.

3874

The People of the State of New York,
Respondent,

-against-

Carlos Boutureira,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Haft, J.), rendered on June 28, 1978, convicting defendant, after a jury trial, of manslaughter in the first degree, conspiracy in the second degree, assault in the first degree, assault in the second degree, and riot in the first degree, and said appeal having been argued by Mr. Robert Louis Cohen of counsel for the appellant, and by Mr. Robert M. Pitler of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

JOSEPH J. LUCCHI,
Clerk.

APPENDIX E

State of New York, Court of Appeals
Certificate Denying Leave

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH CHIAPETTI

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
April 17, 1979

s/JACOB D. FUCHSBERG
Associate Judge

APPENDIX F

State of New York, Court of Appeals
Certificate Denying Leave

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

ANDRES SANCHEZ

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
April 17, 1979

s/JACOB D. FUCHSBERG
Associate Judge

APPENDIX G

State of New York, Court of Appeals
Certificate Denying Leave

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

CARLOS BOUTUREIRA

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
April 17, 1979

s/JACOB D. FUCHSBERG
Associate Judge

APPENDIX H

State of New York Court of Appeals
Certificate Denying Leave After Reconsideration

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH CHIAPETTI

The above named appellant having applied by letter dated April 25, 1979 for reconsideration of the certificate dated April 17, 1979 denying him leave to appeal to this Court, the motion for reconsideration is granted and, upon such reconsideration, the denial of leave is adhered to.

Dated at New York, New York
May 8, 1979

s/JACOB D. FUCHSBERG
Associate Judge